Original

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE PACIFIC COAST COLD STORAGE COMPANY, a corporation, *Appellee*,

vs.

ST. PAUL FIRE AND MARINE INSURANCE COMPANY, a corporation, *Appellant*.

No. 1417

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

Brief of Appellee

W. H. BOGLE,
Proctor for Appellee

377 Colman Building
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STATEMENT.

The appellee is a corporation located in Tacoma, Washington. Its principal business is the sale of refrigerated products, such as meats, fish, eggs, vegetables, butter, etc., in the markets of Nome and St. Michael, Alaska, and at Dawson in the Yukon Territory. It has been engaged in this business since about the year 1900. It owns refrigerating plants at Tacoma, Washington, at Nome and St. Michael, Alaska, and at Dawson. It also owns the

steamship "Elihu Thompson" and the river steamer "Robert Kerr," both of which are equipped with large refrigerating compartments, and are especially fitted for the carriage of such products as are handled by the appellee. The appellee buys its products in the markets of Seattle, Tacoma and San Francisco, and, after freezing them, carries them by the steamship "Elihu Thompson" to Nome and St. Michael. The goods destined to Dawson are transferred at St. Michael from the refrigerating chambers of the "Elihu Thompson" to the cold storage rooms of the "Robert Kerr," and by that steamer carried up the Yukon River to Dawson, where they are stored and preserved in the refrigerating plant of the company at that city. As the Dawson market is inaccessible from the outside during the winter months, it is the custom of the company to ship during the summer such supplies as are needed for its Dawson market during the winter months. The company also does some business in feed stuffs. The company also owns a barge called the "Peter," which is carried by the steamer "Robert Kerr" as a tow, and upon which the hay and feed stuffs are carried up the Yukon River. This barge is not refrigerated. The steamship "Robert Kerr" is the only refrigerated boat operating on the Yukon River. She has been owned by this company and operated on the river between St. Michael and Dawson since 1900.

In July, 1903, the company shipped per the "Elihu Thompson" a cargo consisting mainly of refrigerated products, together with some hay and feed stuffs, destined for Dawson. The invoice value of this shipment at Tacoma, Washington, the point of shipment, was $64,572.20. An itemized statement of the shipment will be found on page 1049 of the record. On July 30, 1903, the company took out a marine insurance policy with the appellant company in the sum of $60,000, for which it paid $900.00 premium. This policy was what is known as the "*cargo English form policy.*"

The "Elihu Thompson" reached St. Michael in due course, and there transferred the refrigerated cargo to the "Robert Kerr." The hay and feed stuffs were transferred to the barge "Peter." The "Kerr," with the barge in tow, left St. Michael on the 28th day of August, 1903, bound up the river for Dawson. When she reached the mouth of the Yukon River she found a strong off-shore wind blowing, and as a consequence the water was very low over the mud flats which are crossed in reaching the river proper. She was delayed about three days hours at this point for this reason. She then proceeded up the river, encountering nothing more than the usual incidents of such a voyage, and reached Fort Yukon on the 20th day of September. The master of the "Kerr" decided at that time, owing to the unusually low stage of the river, there was uncertainty

about his ability to reach Dawson with this barge in tow, and appreciating the necessity of arriving safely with his more valuable cargo, the barge was left at Fort Yukon, while the "Kerr" proceeded up the river. On September 22nd the "Kerr" stranded at a point in the Yukon flats known as "Two Pipe Slough." The master communicated with the company's representative in Dawson, and that representative ordered the steamship "Lightning" to proceed down the river to the relief of the "Kerr." The "Kerr," however, succeeded in getting off the bar on September 28th, having lost six days, and proceeded up the river to a point about twelve miles below Circle City, at which point she was met by the steamship "Lightning," sent to her relief from Dawson. On account of extreme low water it was necessary to transfer a portion of the cargo of the "Kerr" to the "Lightning" in order to pass what is known as the "Twelve-Mile Bar." This was accomplished, and the "Kerr" and "Lightning" reached Circle City on October 4th. At that time the Yukon River was falling rapidly, and ice was forming in the river, making navigation hazardous. The manager of the Cold Storage Company had gone down from Dawson on the "Lightning," and he and the master of the "Kerr," after consultation, decided that it was impossible to get through with the "Kerr" to Dawson during that season, but that the "Lightning," carrying a smaller cargo and less draught, would be able to get through.

Approximately one hundred tons of the cargo from the "Kerr" was transferred to the "Lightning," and she proceeded up the river to Dawson, and the "Kerr" was moored in a slough near Circle City. This slough is shown by the evidence to have been the safest place in which the steamship could be moored at that time, it being impossible for her to proceed any great distance either up or down the river. The "Lightning" succeeded in reaching a point known as Washington Creek, about 150 miles down the river from Dawson, and was frozen in at that point. The "Lightning" had no refrigerating chambers, but it was very cold at that time, and the goods were perfectly safe during the balance of the winter.

The testimony shows that the temperature along the Yukon River during the spring rises above the freezing point some twenty-five or thirty days before the river is clear of ice and open to navigation. The spring thaw in the river ice begins at the head and gradually extends down the river. This immense quantity of floating ice forms jams in the river at different points, which, with the ice pressing from above, rises to a height of forty to sixty feet, and backs up for a distance of from eight to ten miles. When these jams break, the immense volume of water and mass of ice will destroy any steamer lying in its pathway at a distance of from six to ten miles below the jam. Of course, the water and ice gradually spread out and becomes less disturbing further down. When

these two steamers were reported to the company as frozen up in the river, the company reported the facts to the appellant Insurance Company, and asked for instructions in the premises. On or about the 8th of November, 1903, the general agent of this Insurance Company, Mr. M. C. Harrison, of San Francisco, came to Seattle for the purpose of looking into the situation of the cargo on these boats, and determining what course should be taken. After conferring with a representative of the Cold Storage Company, a telegram was framed and sent to the manager of the Cold Storage Company at Dawson, asking the location of the two boats, the amount of cargo in each, the perils to which the boats and cargo were exposed, and the cost of removing the cargo overland to Dawson. An answer was received to this telegram on November 9th, which is found in the Record on p. 229. This telegram stated the situation of the two boats, gave the approximate quantity of cargo on each, and expressed the opinion that the boats were in a reasonably safe position, and gave the estimated cost of removing the cargo overland to Dawson during the winter. This telegram was submitted to the representative of the Insurance Company, and the question of the relative advisability of leaving the cargo on board the vessels, taking the chances of escaping serious injury on the break up of the ice during the spring, or removing the cargo overland to Dawson during the winter was fully discussed. The ques-

tion of abandoning the cargo to the underwriters was also discussed. The representative of the Insurance Company directed the Cold Storage Company to take such action for the safety of the cargo as in its judgment seemed wise and proper, stating that the company was more familiar with the conditions than was the Insurance Company, and had better facilities for removing the cargo. The Insurance Company's representative at that time also agreed to endeavor to secure an advance of $25,000 from the Insurance Company and its re-insurers to be used by the Cold Storage Company in defraying the expenses of the removal overland to Dawson (p. 597 of the Record). This understanding was reached on or about November 9th or 10th, 1903. It afterwards transpired that the manager of the Cold Storage Company at Dawson had, on October 31st, made a contract for removal of the cargo from the "Lightning" to Dawson. That contract is Exhibit "C/812" of the Record. Subsequently, on December 29, 1903, under instructions from the Cold Storage Company, he made a second contract for the removal of the cargo from the "Kerr" to Dawson. That contract is Exhibit "D/821" of the Record.

The cargo was accordingly removed from the "Lightning" to Dawson during the months of November and December, and the greater portion of the cargo of the "Kerr" was removed to Dawson during January, February and March, 1904. The spring thaws, breaking up the

trails, came on before all of the cargo of the "Kerr" had been removed. From time to time, as the expense bills for these removals were received by the Cold Storage Company at Tacoma, they furnished the Insurance Company with either the original or copies, and kept that company fully informed of all steps being taken. On June 21, 1904, the Insurance Company did advance the Cold Storage Company the sum of $15,000 towards these expenses, the receipt of which is found in the Record on p. 835. After the removal was completed and the expense vouchers received from Dawson, the Insurance Company requested the Cold Storage Company to have the claim placed in the hands of an adjuster, and considerable correspondence passed between the parties in the effort to agree upon some adjuster satisfactory to both parties. The Insurance Company wished the adjustment to be made by a Mr. Bishop from San Francisco, but he was unsatisfactory to the Cold Storage Company by reason of the fact that he had business relations, or had previously had business relations, with M. C. Harrison & Company, the representatives of the appellant. The adjustment was tendered by both parties to Mr. LeBoyteaux of San Francisco, but was declined by him. Afterwards Mr. E. A. Alexander of San Francisco was agreed upon by both parties as a satisfactory adjuster, and was accordingly appointed by the Cold Storage Company. The adjustment was made by

him, and he found the Insurance Company to be liable on this loss in the amount of $51,188.00. The adjuster treated all expenses connected with the sending of the "Lightning" down the river to the relief of the "Kerr" at the time she was stranded as general average expenses, chargeable to all interests involved. He treated the expense of removing the "Lightning" cargo from Washington Creek to Dawson, and the expense of removing the "Kerr's" cargo from Circle City to Dawson as "sue and labor" expenses made for the benefit of the cargo alone. The Insurance Company having refused payment of the claim as adjusted, this action was brought. The court below disallowed these items of the adjustment, grouped under the head of *General Average,* but allowed the forwarding expenses amounting to $4472893, and the decree was accordingly drawn for that amount, less the $15,000 previously advanced. From that decree this appeal was taken.

ARGUMENT.

In discussing the case, we will confine ourselves to the seven specific points relied upon by the appellant and stated on pages 9 to 11 of its brief.

I.

The appellant challenges the jurisdiction of the court below. The jurisdiction of courts of admiralty over suits based upon marine contracts of insurance was finally established by the Supreme Court in *Insurance Company vs. Dunham,* 11 Wall. 1. This is conceded by appellant, but its contention is that the sue and labor clause is not an integral part of marine insurance, and therefore not a maritime contract. This distinction is not supported by any authority, and we do not think it is founded in reason. The sue and labor clause is a part of the contract of marine insurance,—it is somewhat in the nature of salvage. It is a sum or sums expended to avert a loss, which, if it occurred, would fall upon the underwriter. The determination whether a particular claims falls within the sue and labor clause of marine policy involves a consideration of the further question whether the loss or peril to which the cargo was exposed, and which was averted by the expenditure, was a sea peril or danger of navigation, or otherwise within the terms of the policy. These questions involve maritime law.

In the Dunham case the Supreme Court held that a marine insurance policy was a maritime contract, and therefore within the admiralty jurisdiction. It is immaterial whether the money was expended on shore or on sea. Many repair bills are incurred on shore and paid

on shore, and are supported by a maritime lien and within admiralty jurisdiction. Warehouse charges paid for the protection of goods removed from a ship in port of distress, while repairs are being made, are also incurred and paid on shore, but are universally recognized as covered by the marine insurance policy and recoverable in admiralty. If the contention of appellant on this point should be sustained, it would result in the assured being driven to prosecute suits in different forums for the recovery of different items of one loss sustained under one contract. To illustrate: In this case certain of the expenditures made by the appellee were made for the safety of both cargo and vessel, and were general average expenses. Other expenditures were made for the preservation and safety of the cargo alone. The appellant concedes that Admiralty Court has jurisdiction of an action upon an insurance policy to recover general average expenses. Their contention, if sustained, would result in requiring the assured to bring his action in admiralty for such portion of his expenses as were general average expenses, and to resort to a court of law for the recovery of such expenses as fall under the sue and labor clause, having been for the benefit of the cargo alone. Such a doctrine is not sanctioned by any authority cited, and is, we think, directly contrary to the decision of the Supreme Court in the case of the *Insurance Company vs. Dunham, supra.*

II.

The appellants' second point is that the cargo of the "Kerr" was exposed to no peril under the terms of the policy. Brief, p. 9. The steamer "Kerr" reached a point on the river known as "Two Pipe Slough" on September 22d and stranded on the bar. She was detained there until September 28th, when she succeeded in releasing herself. The testimony clearly shows that if she had not stranded at that time she would have reached Dawson, her destination, within four days, or by September 26th. This is conceded by Douglass, the principal witness of the appellant. (Record p. 685-6.) Owing to the delay resulting from this stranding, and to the fact that the river was falling very rapidly, and the ice forming in the river in great quantities, it was found impossible to get through to Dawson during that season, but the master of the "Kerr" and Mr. Bryant, the manager of the appellee company at Dawson, who had gone down the river to meet the "Kerr," finding it impossible to get through with the "Kerr" during that season with the entire cargo on board, transferred about one hundred tons of the refrigerated cargo to the steamer "Lightning," leaving something over one hundred tons on the "Kerr." The "Lightning" was a lighter draught boat, and it was thought that she would be able to get through to Dawson, and that probably both steamers would get through with this lighter load. When they reached Circle City they found that the river

had fallen more rapidly than they had anticipated, and that the ice was becoming dangerous to navigation, and they ascertained that several of the boats which had recently passed up the river, notably the "Susie" and the "Louise," had suffered mishaps on account of the low water and heavy ice, and had been compelled to discharge their cargo along the river banks in order to enable the boats to get through to Dawson. In view of this situation it was deemed prudent to send the "Lightning" forward and to moor the "Kerr" at Circle City. The "Lightning" succeeded in going up the river to a point known as Washington Creek, about 120 miles below Dawson, where she was frozen in the ice with her cargo on board. The only point near Circle City available for mooring the "Kerr" was an open slough, and she was accordingly placed in winter quarters at that place. The testimony conclusively establishes the fact that both vessels were considered by men familiar with conditions on the Yukon River during the break-up of ice during the spring as exposed to great danger of either total loss or disablement. The "Lightning" was not a refrigerated boat. The testimony shows that the temperature rises above the freezing point along the Yukon River from twenty-five to thirty days before the ice breaks up in the river, and the river is open to navigation. If the cargo had been left on board the "Lightning" during that twenty-five or thirty days, exposed to temperature above

freezing point, it would inevitably have been ruined, and have been a total loss. Even if the "Lightning" had succeeded in escaping the danger of being crushed when the ice broke up in the spring, the cargo would have perished before that time. There has been some suggestion in the record that the cargo could have been placed on shore and protected with ice during this period when the temperature was above freezing and before the river was open. The testimony of those witnesses who have had any experience with refrigerated goods has been uniformly to the effect that refrigerated products cannot be kept hard frozen by means of an ice house, even where the house is constructed of the best material; and, further, that there was no material available at that point to have constructed an ice house of any kind. But it is perfectly apparent that even if the goods could have been preserved by means of ice on shore until the "Lightning" was extricated from her dangerous position, and the river open to navigation, the goods could not have been forwarded to Dawson on the "Lightning," because she had no refrigerated chambers. The necessity of removing the goods from the "Lightning" overland to Dawson during the winter season was therefore admitted by every one.

In the case of the "Kerr" the facts were somewhat different. She was moored near Circle City. She had refrigerated chambers. The goods were perfectly safe so long as they remained on board in these refrigerated

chambers. The testimony shows, however, that the strong probability was that the "Kerr" would be crushed and disabled on the break-up of the ice in the spring. The goods on board were, of course, exposed to that peril. The practical question presented to the assured by that condition of affairs was, what should be done with the goods? If they were left on board the "Kerr" they would be exposed to the risk of total loss by the destruction or disablement of the "Kerr" on the break-up of the ice in the spring. They could not be removed to shore and kept there during the winter and then re-embarked on the "Kerr" without being subjected to the same risk, for two reasons: In the first place, as we have stated above, there is a period of twenty-five to thirty days in the spring during which the temperature is above freezing, and yet the ice unbroken in the river, and navigation shut off. The goods on the shore during that season, being perishable, would have been ruined. In the second place, if in the break-up the "Kerr" was either crushed and destroyed or merely disabled, the goods would also have been lost, for the reason that the "Kerr" was the only refrigerated boat on the Yukon River, and if she had been disabled it would have been impossible to have forwarded the goods to Dawson, or to any other point of safety after the opening of navigation. They could not be forwarded on the ordinary boats for lack of properly refrigerated chambers. The only other alternative was to forward the goods to Dawson during the winter time when the temperature

was below the freezing point. The peril, therefore, to which the goods were exposed was this, that on the breaking up of the ice in the spring the vessel might be either destroyed or disabled by the masses of ice floating down the river.

We deem it unnecessary to cite any authority to the fact that that is a sea peril covered by the policy of insurance. We are not at this time discussing the question of the advisability of forwarding the goods, instead of taking the risk that the boat would get through the break-up in safety, but are addressing ourselves to the question raised in the brief, namely: That the peril to which the goods were exposed was not a peril covered by the policy. We respectfully submit that there is no foundation for that contention.

The appellant has argued in his brief that there was no necessity to remove the goods from the vessel and forward them overland to Dawson, and that they were so removed and forwarded by the assured in order to get them into the winter market in Dawson. We think that the record clearly disproves this contention. Of course, the assured was anxious to get his goods to market. That was the reason he purchased the goods and shipped them. But the record shows very conclusively that the election to remove the goods from the vessel and forward them overland, instead of leaving them on the vessel and taking the risk of total loss, was made by the assured for the

safety of the goods themselves, and that this election was assented to and approved by the Insurance Company. The testimony shows that as soon as these vessels were reported to the assured company as ice bound along the river, this information was passed on to the Insurance Company. Mr. M. C. Harrison, the president of M. C. Harrison & Company, named in the policy as the general agents of the Insurance Company, came from San Francisco to Seattle for the express purpose of deciding what was best to be done with these goods. This is shown by his letter on p. 850 of the Record, and by the testimony on behalf of the appellant on pp. 194 of the Record. After his arrival at Seattle a telegram was framed by him and the assured and sent to Mr. Bryant at Dawson, asking for particular statement of the position of each vessel, the quantity of cargo on each, the opinion generally entertained as to the safety or otherwise of each vessel, and the cost of removing the cargo from each vessel. The answer was received from Mr. Bryant on November 9th, giving this information fully. That telegram is found on p. 226 of the Record. It was shown to Mr. Harrison, who thereupon directed the assured to take such steps as in its judgment were wise and judicious for the safety of the cargo. He was told that the company thought it wise to remove the cargo and forward it to Dawson overland, rather than take the risk of total loss on board the ship. He not only acquiesced in the advisability of forwarding the goods overland, but agreed to endeavor to induce the

re-insurers, as well as his own company, to advance $25,000 to the assured to assist it in meeting the expenses of forwarding the goods. His assent to the view that it was advisable and judicious to forward the goods overland to Dawson, rather than take the risk of their total loss by the breaking up of the ice in the spring, is admitted in the pleadings, and is proven by the testimony, and is admitted by Harrison in his letter to appellant found on p. 252 of the Record. The libel alleges as follows:

"That libellant informed respondent of the existing peril to said cargo, and was instructed by respondent to take such steps as libellant thought necessary to save said cargo and to forward same overland to Dawson, if libellant thought it necessary to do so."

The answer to this allegation is as follows:

"And further admits that the libellant notified the respondent of the alleged position and peril of said cargo; and further admits that respondent consented to the libellant taking such steps as it thought best to save said cargo."

It was shown by the testimony of the witness Bogle that this agreement was arrived at on or about November 9th or 10th, 1903, after receiving the telegram from Bryant giving the exact position of each of the vessels, the amount of cargo on each, and the approximate cost of removing such cargo to Dawson. In short, the situation was this:

The cargo was on board vessels caught on the river by the cold weather and frozen in. To leave it on the ves-

sels until the river was again open to navigation involved the risk of a total loss by the destruction or displacement of the vessels. To remove the cargo involved a certain expense of from thirteen to sixteen cents a pound. The assured consulted the underwriter and asked his instructions as to whether he would prefer to have the goods remain on board and take the chances of either saving them or of a total loss, or incur the heavy expense of forwarding overland to Dawson, and avoid the chances of total loss. It was necessary to arrive at a decision at that time, because if the goods were to be moved overland it would require all winter to consummate that work. The decision was of necessity made in view of the conditions as they then existed. The assured, as is shown by the testimony of both Mr. Bryant and Mr. Richardson, the president of the company, made inquiries of the people most familiar with conditions along the Yukon River during the break-up of the ice in the spring, and reached the conclusion that the cargo would in all human probability be lost unless it was removed overland during the winter. The underwriter, through Mr. M. C. Harrison, its general agent, and Mr. J. A. Houck, its local agent at Seattle, made similar inquiries and obtained their own information upon that subject. Both the assured and the underwriter came to the conclusion that it was advisable to remove the goods, although the cost was known to be very heavy, rather than take the risk of a total loss, and accord-

ingly the assured undertook the work of removal, and the underwriter promised to make an advance of $25,000 towards that expense, and gave every possible assurance that as soon as the removal was completed, and the vouchers showing the total expense received, and the claim adjusted, the underwriter would pay such proportion of that expense as it was liable for under its insurance policy. The position of the underwriter at that time was that its liability for the forwarding expenses was such proportion thereof as the amount of insurance, $60,000, bore to the destination value of the goods. The assured was of the opinion that the underwriter's liability for these forwarding charges was such proportion thereof as the amount of the insurance bore to the value of the goods at point of shipment. To illustrate: The value of the goods at point of shipment was $64,572, the destination or Dawson value was approximately $130,000. Now both parties conceded the advisability of forwarding the goods overland during the winter, and agreed that it should be done. The question of what proportion of the expenses of such forwarding should be borne by the underwriter was left open for future determination, that company claiming that its proportion of such expenses should be as $60,000. whereas the assured claimed that the underwriter was liable for such proportion of the forwarding expenses as $60,00 bore to $64,570 plus $900.00 insurance premium. This was the contention, and only contention, between the parties at the time it was agreed to forward the goods, as

shown by the testimony of the witness Bogle (p. 555 of the Record), and by the letter of Mr. Harrison (p. 554 of the Record). The assured was contemplating an abandonment of the goods to the underwriter, and the underwriter dissuaded him from doing so, but encouraged him to forward the goods to Dawson, in reliance upon the promises of the underwriter to pay such proportion of these expenses as were proper under its policy.

Under these circumstances, we respectfully submit that the contention now made by the underwriter that it was unnecessary to forward the goods, and that the goods were not forwarded for their own safety, but because the owner wanted to reach an early market, is without any foundation whatever in fact. After encouraging the owner to expend a large sum of money in the preservation of the subject of insurance, it seems to me that it is fraudulent upon the part of the underwriter to take the position, after the event has occurred, and the expenditures have been made, that such forwarding was unnecessary and unwise and not justified by the existing peril.

In the face of these facts, I must respectfully insist that the underwriter cannot now be heard to say that the removal and forwarding of the cargo was unnecessary or injudicious. The situation as it then existed was fully disclosed to them, and they were asked for instructions and gave them. The assured acted upon these instruc-

tions and expended large sums of money in so doing. If it was the purpose of the underwriter to stand aloof, without committing himself to either course, and put the entire responsibility of meeting the emergency as it then existed upon the owner of the goods. good faith required it to signify that purpose at the time.

It seems to be further contended by appellant that it is not liable for these forwarding charges for the reason that the peril to avert which these expenditures were incurred was not real and imminent, and that an underwriter is not liable for expenses caused through mere apprehension of a loss by a peril insured against (p. 16 Brief). The test of the sue and labor expense is that it was incurred (1) to avert a loss or probable loss (2) which the underwriter would have been compelled to pay. Mr. Arnould in his work on Marine Insurance states the rule as follows:

"If by the perils insured against the subject matter of insurance is brought into such danger that without unusual or extraordinary labor or expense, a loss will very probably fall on the underwriters, and if the assured or his servants or agents exert unusual or extraordinary labor, or if the assured is made liable to unusual or extraordinary expense in or for an effort to avert a loss, which, if it occurs, will fall on the underwriters, then each underwriter will, whether in the result there is a total loss, or any loss at all, not as a part of the sum insured, but as a contribution independent of and even in addition to the whole sum insured, pay a sum bearing the same proportion to the cost or expenses incurred, as the sum they would have had to pay if the probable loss had occurred,

or to the loss which because the efforts have failed has occurred, as that loss bears to the sum insured."

2 *Arnould Marine Ins.* Sec. 870 (___7___ Ed.).

There can be no question about the fact that the cargo was in a position of peril, and that these expenditures were incurred by the assured by the consent and acquiescence of the underwriter to avert a probable loss from the peril then pending. The cases cited by respondent on p. 17 of its brief to the effect that an underwriter is not liable for the expenses incurred because of apprehension of the occurrence of a peril not then pending, have no application to the facts in this case. The vessels upon which the goods were loaded were actually frozen in the ice, and the peril of the destruction of the vessel upon the breaking up of the ice was certain and inevitable, unless the goods were removed.

Appellant seems to take the position that the removal of the goods from the vessel to shore ended the risk from sea perils, and that the subsequent forwarding expenses are separate and independent and attributable to the nature of the goods, and therefore not within the policy. This position is not definitely assumed by appellant, but seems to be fairly a part of their contention. We think it is totally unfounded. Where owing to the sea perils a necessity arises for the removal of the insured cargo from the vessel, and as a consequence of such removal, and to avoid a total loss, the goods are forwarded to destination

by other means, whether by another vessel or overland, the charges and expenses for so doing are an actual consequence of the peril necessitating the removal, and are chargeable to the underwriters of the cargo.

Hubbell vs. G. W. Ins. Co., 74 N. Y. 254.
Munsford vs. Ins. Co., 5 Johns. 262.
Searle vs. Schoville, 4 Johns. Ch. 318.
Dodge vs. Marine Ins. Co., 17 Mass. 431.
Williams vs. Smith, 2 Am. Dec. 210.
2 *Arnould Marine Ins.* (7 Ed.), Sec. 870. note.
Abbott Shipping (6 Ed). 365, note.
3 *Kent Com.* 212.

Although the insured cargo suffered damage after removal by reason of the nature of the goods and the exposure resulting from the removal, the underwriter is uniformly held liable therefor, if the necessity of removing the goods from the ship resulted from a sea peril, even though the policy expressly stipulates against liability for loss by the inherent vice of the goods insured.

Tudor vs. N. E. Mut. Ins. Co., 12 Cush. (Mass.) 554.
Ins. Co. vs. Boone, 95 U. S. 130.
Ins. Co. vs. Tweed, 7 Wall. 44.
Phillips on Marine Insurance, Sec 1132.

Where owing to a sea disaster the goods were landed and had to be transported to a place of safety by a land conveyance, the expense of this conveyance was charge-

able to the underwriters on the cargo, as well as all damage to the goods from exposure in the land transit.

Bryant vs. Ins. Co., 13 Pick. 543.

The general rule is established by Mr. Justice Story in *McGoun vs. Ins. Co.*, 1 Story 164, in the following language:

"And the consequences naturally following from the peril insured against or incident thereto, are probably attributable to the peril itself."

If a steamer carrying a cargo of silks and teas from the Orient to Puget Sound ports should suffer a disaster at sea and put into some harbor along the Aleutian Islands for repairs, and the cargo was removed from the ship in order to enable the repairs to be made, and exposed to the elements on shore, we apprehend that no one would contend that the underwriter was not liable for the loss or damage sustained by these goods by reason of the exposure on shore. It is so in the present case,—if the goods were removed from the vessel as a consequence of the sea peril, and would have suffered total loss unless forwarded overland to Dawson during the winter season, the expense of so forwarding is a consequence of the sea peril necessitating the removal of the goods from the ship.

The appellant in its brief has quoted from the memorandum decision of the court below certain portions thereof in the attempt to show that the court below did not find that the goods were removed from the vessel because

of a sea peril then pending. The extracts quoted by counsel are misleading when used for such purpose. The steamer "Kerr" had stranded on her way up the river on September 26th, and certain expenses had been incurred by the assured as the consequences of that stranding. The main item of these expenses was the hiring of the steamer "Lightning" at Dawson and sending her to the relief of the "Kerr" during the time the "Kerr" was stranded. The adjuster had allowed the expenses thus incurred as a general average against both vessel and cargo, and the libel in this case sought to recover the underwriter's proportion of that general average. The court below decided that claim against us, holding that the fact that the "Kerr" stranded on a bar in the river and was delayed in getting off did not give rise to a general average expense; that such stranding is an incident naturally to be expected in the navigation of the Yukon River. And it is to this fact the court is referring when he used the language quoted by appellant on pp. 22 and 23 of their brief. The peril, however, which gave rise to the forwarding expense arose when the vessel was frozen in the river and exposed to the danger of destruction from floating ice in the spring. Instead of the court below holding that this was not a peril insured against, it will be found on examining his decision that he expressly held the contrary.

III.

It is contended, third, by the appellant as follows:

"The appellant contends that the terms of the policy were invalidated by splitting up the voyage and separating the insurable risks which would have contributed to the general average loss, if any occurred, and by the refusal of the appellee, the Pacific Cold Storage Company, to sacrifice such part of the cargo as was necessary to enable the 'Kerr' to proceed up the river, if any peril or loss did occur." (Brief pp. 10, 24.)

We do not quite understand what is the precise point sought to be made by appellant in determining the proportion of the expenses for which the underwriter was liable. The adjuster, as well as the court below, took the invoice value of the entire cargo, to which was added the insurance premium, and apportioned the expenses as between the underwriter and the assured on that basis. The non-perishable cargo was carried up the river on the barge "Peter." However, the fact that that portion of the cargo was carried upon the barge, and not technically upon a "connecting steamer," does not seem to us to be involved in this case. There was no claim made against the underwriter for any loss or damage to, or expense incurred on account of any of the cargo upon the barge, but the underwriter did have the benefit of the value of that cargo in the apportionment of the forwarding expenses of the

other cargo. It does not seem to be contended by appellant, and we apprehend that it will not be claimed by them that the separation of a portion of the cargo by transferring it at St. Michael to a barge, instead of a "connecting steamer," would have the effect of invalidating the insurance of the goods upon the steamer. The contention made in their brief that the master of the "Kerr" should have jettisoned a portion of her cargo is not supported by any evidence in the case, and, even if it was well founded in fact, it would have no effect upon the assured's right of recovery. Mistakes in navigation and negligence of the master and crew do not exempt the underwriter.

Gen. Mut. Ins. Co. vs. Sherwood, 14 How. 351.

Orient Ins. Co. ..... vs Adams, 123 U. S. 72.

..... *vs.* ....., ~~125 U. S. 438~~.

III

It is contended that the steamer "Kerr" was unseaworthy, and that therefore the policy never attached. We contend: First, that the steamer "Kerr" was in fact seaworthy when she commenced her voyage at St. Michael. Second, that in point of law the policy attached upon the commencement of the voyage by the steamer "Elihu Thompson" at Tacoma, and that the unseaworthiness of the "Kerr," if in fact it existed, is immaterial.

1. The unseaworthiness alleged against the "Kerr" was, first, overloading, and, second, defective boilers. She has been owned by the assured and has been engaged in

this particular run between St. Michael and Dawson since the year 1900. The testimony also shows that she has always made two round voyages each season, and had usually carried a larger cargo than she had on board on the particular voyage in question.

She had never previously had any difficulty on any of her voyages. In view of these facts, we deem it unnecessary to pay further attention to the charge that she was overloaded. The Yukon River, particularly that section of it known as the Yukon Flats, is very broad and shallow. Steamers in passing over the flats use pilots who are familiar with the various channels of the river. These channels are shifting and change frequently between voyages. Under these conditions, the fact that a steamer becomes grounded on some of the bars is no evidence that she is overloaded, but is rather evidence of the fact that the channel at that place has shifted, or that the river

is unusually low. On the voyage in question the steamer encountered both of these conditions.

This steamer was equipped with tubular boilers. The waters of the Yukon are always more or less muddy. A sediment is deposited around the ends and in between the tubes, necessitating the putting out fires and washing out the boilers about every fourth day. This sediment also packs closely around the ends of the tubes, preventing the water from reaching that portion of the tube itself, which naturally results in the tube becoming heated and the expansion and contraction of the engine tubes follow. This inevitably results in more or less leaking of the boilers. When the "Kerr" was in port at St. Michael before the commencement of the voyage in question, her boilers were thoroughly overhauled both by the engineers in charge and an experienced boilermaker, who was at St. Michael in the employ of one of the large trading companies. The boilers were put in the very best condition possible with the facilities of that port, and both the boilermaker, who made these repairs, and the chief engineer, who assisted him, have testified that the boilers were in first-class condition at the time the "Kerr" left St. Michael on this voyage. The boilers were subjected to 150 pounds cold water hydrostatic pressure for from fifteen to thirty minutes after these repairs were made, and stood the test perfectly. This fact is established by the testimony of Jackling, the chief engineer, and Atwell, the assistant

engineer. After the steamer left St. Michael she stranded in the mud flats off the mouth of the Yukon River, and was delayed from August 28th to 31st. This stranding was caused by low tide and off-shore winds, and is a frequent occurrence with steamers plying the Yukon River to St. Michael. During the time this steamer was grounded on these mud flats the engines were worked constantly back and forth in the effort to get her off, and the log book reports that the boilers and engines were working well and no leaks were shown. This work was done, of course, in muddy water on the mud flats, and a sediment necessarily accumulated around the boiler tubes. After relieving herself and getting over the mud flats, the steamer proceeded up the river, and on the first of September a slight leak developed in the tubes of one of the boilers. On September 3rd the leaks had increased, and the engineers spent six hours in repairs. This work did not delay the vessel, but was done while the vessel was taking on fuel. No further leaks developed until September 11th, when a slight leak showed up in port boiler, but which caused no delay. On September 13th these tubes were repaired while the boiler was being washed out and cleaned. On the 18th another slight leak developed, which was repaired by the engineers without loss of time. The steamer stranded on a bar on September 22nd, and did not get off until the 28th.

The above covers substantially the entries of the engineer's log book and pilot house book relative to any possible delays to the steamer by leaking boilers. The witness Douglass, who was introduced by the appellant, and who was the pilot on the "Kerr" on this voyage, shows rather more delays on account of leaks than would be indicated by the log books. He testified, however, that the "Kerr" at the average speed she was making on the voyage would have reached Dawson by September 28th, if she had not stranded on the 22nd and been delayed for six days. (pp. 686 Record.)

We respectfully submit that under this testimony it is impossible to find that the steamer "Kerr' was not in a reasonably fit condition for this voyage at the time she left St. Michael.

The burden of proof of unseaworthiness in an action by cargo owner on a marine policy is on the insurer.

Guy vs. Mutual Ins. Co., 30 Fed. 695.
Batchelder vs. Ins. Co., 30 Fed. 459.
Baker vs. Ins. Co., 16 Fed. 916.
2 *Arnould Marine Ins.* (7 Ed.), Sec. 1277.

While the rule is that the discovery of unseaworthiness very shortly after leaving port will ordinarily justify the inference of fact that the vessel was unseaworthy when she left port, yet if there is proof that the vessel encountered such conditions after commencing her voyage as were sufficient to have caused the defect, the court will

attribute the defect to these perils, rather than presume unseaworthiness at the beginning of the voyage. The inference of unseaworthiness at the beginning of the voyage will not be drawn from subsequent unseaworthiness, unless it develops very shortly after sailing, and then only when the vessel has not encountered any sea conditions or accidents which could have caused the damage.

The "Sandfield," 79 Fed. 371.

The "Warren Adams," 74 Fed. 415.

"British King," 89 Fed. 872.

The "Aggie," 93 Fed. 491.

Where the unseaworthiness is alleged to consist of leaking boiler tubes developed five or six days after sailing, proof that the vessel had grounded in the meantime, and had changed from salt to fresh water in her boilers, and had made constant use of muddy water in the boilers, which has a natural tendency to cause leaks, is amply sufficient to rebut any inference of unseaworthiness when the voyage commenced, particularly where the affirmative evidence of seaworthiness at the commencement of the voyage is in the record.

I contend further that mere leaky tubes do not constitute unseaworthiness. Seaworthiness is defined to be "reasonable fitness for the voyage contemplated." Proof Perfection is not required. If the vessel is reasonably fit to make the voyage in safety, she is seaworthy.

The Aggie, 93 Fed. 490.

The Titonia, 19 Fed. 105.
The Rover, 33 Fed. 521.
The Fjomo, 115 Fed. 922.
The Mauna Loa, 76 Fed. 836.

When the risk attaches, after a long voyage, at a distant port, or an out-of-the-way port, the implied warranty of seaworthiness must be construed in view of the probable conditions of the vessel after her long voyage, and of the facilities for repairs at that port.

Paddock vs. Ins. Co., 11 Pick. 231.
Moore vs. Underwriters, 14 Fed. 226.
1 *Phillips on Marine Insurance Co.,* Sec. 727.
1 *Parsons on Ins.,* 387.

This rule is particularly applicable to this case. The "Robert Kerr" was known to be engaged on the Yukon River run. It was known that the waters of this river are muddy, and that the boilers were subject to both fresh and salt water on each voyage, and that these conditions necessitate frequent repairs to the tubes of the boilers. It was also known that the facilities for repairing boilers at St. Michael are very limited. These facts were known to the underwriters when they issued their policy. The implied warranty therefore as to the boilers must be construed in view of these known facts. In view of the facts above recited, and of the authorities, it cannot be successfully maintained that leaking boiler tubes, even to the extent claimed by appellant, constituted unseaworthiness.

The positive testimony is that the boilers were put in the best condition possible with the facilities at St. Michael, and that she was reasonably fit for the voyage in question, and it is shown, and even admitted by appellant's own expert witness, that the steamer was not only fit for the voyage, but would have reached her destination in perfect safety by September 26th, except for the stranding on the 22nd of that month. In other words, the steamer proved her actual fitness for the voyage,—her failure to reach destination with the consequent peril to the cargo being caused by delay from stranding, with which her boilers had no connection. I contend, therefore, that the facts do not show that the "Robert Kerr" was unseaworthy at the time she commenced her voyage at St. Michael.

2. We contend in the second place that this was one indivisible contract of insurance for the voyage from Seattle or Tacoma to Dawson; that the steamship "Elihu Thompson" being seaworthy, the policy attached upon the commencement of the voyage and that the unseaworthiness of the connecting steamer the "Robert Kerr" at St. Michael's was immaterial, if, in fact, said connecting steamer was unseaworthy. In other words, our contention is that the implied warranty of seaworthiness attached at the commencement of the voyage at Tacoma, and, having once attached, the subsequent unseaworthiness of the connecting steamer at St. Michael's is immaterial.

The policy was written on cargo from "Tacoma or Seattle to Dawson" in the "ship or vessel called the Elihu Thompson 7/30/03 and connecting steamer." One premium of $900 was paid for the entire risk.

It is well settled that the implied warranty of seaworthiness attached at the beginning of the voyage only; subsequent unseaworthiness will not void the policy.

Union Ins. Co. vs. Smith, 124 U. S. 405.
Arnould on Marine Ins., §695.
American Ins. Co. vs. Ogden, 20 Wend. 287.
Starbuck vs. Ins. Co., 19 Pick. 198.
19*th Amr. & Eng. Ency. of Law,* 2d Ed. 1001.

The reason given is that the owner is in a position to know at the beginning of the voyage whether the ship is seaworthy or not, but he is not in position to keep her seaworthy during the entire voyage, and therefore this is not required by the implied warranty. In the case of a shipper of cargo, the same rule applies, although the reason for it has much less force; but it is justified as to him upon the ground that he has the opportunity to select the initial vessel by which he will ship, and therefore it is in his power to select a seaworthy vessel. 19 *Amer. & Eng. Ency. of Law,* 1002. In the case of time policies on vessels there is no implied warranty of seaworthiness where the policy attaches at a time when the vessel is not

in port. The reason being that the owner has no means of ascertaining whether the vessel is seaworthy or not.

Union Ins. Co. vs. Smith, 124 U. S. 405.

It has also been decided that a warranty of seaworthiness does not extend to lighters and barges used in discharging the ship.

Arnould on Ins., 695.

19 Amer. & Eng. Ency. of Law, 1002.

These authorities seem to establish the proposition that the implied warranty of seaworthiness is a condition precedent to the attaching of the policy; that it is broken, if broken at all, at the commencement of the voyage and therefore the policy never attaches; that if the vessel is seaworthy at the beginning of the voyage, the policy attaches and subsequent unseaworthiness does not avoid it.

The appellate contends that the American rule differs from the English rule on this subject, and that the subsequent unseaworthiness of the vessel does avoid the policy. The correct rule upon this subject is stated by the Supreme Court in the case of *Union Ins. Co. vs. Smith, supra*, as follows:

"In the insurance of a vessel by a time policy the warranty of seaworthiness is complied with if the vessel be seaworthy at the commencement of the risk, and the fact that she subsequently sustains damage and is not properly refitted at an intermediate port, does not discharge the insurer from subsequent risk or loss, provided

the loss be not in consequence of the omission. A defect of seaworthiness, arising after the commencement of the risk and permitted to continue from bad faith or want of ordinary prudence or diligence on the part of the insured or his agents, discharges the insurer from liability for any loss which is the consequence of such bad faith or want of prudence or diligence, but does not affect the contract of insurance as to any other risk or loss covered by the policy and not caused or increased by such particular defect."

There is no claim in this case that the insured was negligent in making repairs upon the steamer "Kerr" either at the time the "Kerr" voyage began, or at any subsequent stage thereof. On the contrary, the testimony is quite conclusive in effect that the assured before making repairs upon the boilers of the "Kerr" both at St. Michael and at such times during the subsequent voyage as the repairs became necessary.

In the present case, however, the voyage was commenced by the steamship "Elihu Thompson," which vessel is conceded to have been seaworthy, and unseaworthiness is ~~reached~~ with respect to the connecting steamer at St. Michael. We have been able to find only one case where the facts were similar ~~like~~ the case at bar. That is where in a cargo policy the voyage was to be made by two separate ships over different parts of the voyage. In Van Valkenberg vs. Astor Ins. Co., 1 Bosworth (N. Y.) 61, the facts were similar. The goods were insured from New York to San Francisco, from New York to the Isthmus by steamship, thence across the Isthmus by "the

usual conveyance," and thence to San Francisco by steamship, making three distinct voyages. The steamship which carried the goods from New York to the Isthmus was seaworthy, but the boats which carried the goods up the Chagreaves River in crossing the Isthmus were not seaworthy and the goods were lost. The case was tried before Judges Bosworth and Hoffman, and different views were expressed by them on the question whether the implied warranty of seaworthiness was satisfied by the seaworthiness of the initial steamship. Judge Bosworth expressed the view that the warranty must be complied with as to each vessel or craft performing any part of the entire voyage, basing his opinion, however, upon a term in the policy that it should "attach only to risks such as shall be approved by the company and endorsed on it," followed by three separate endorsements of the separate risks. He construed this clause as intending to make each separate voyage a distinct risk, as if three separate policies had been written. Judge Hoffman, on the contrary, held that the policy was indivisible and that the warranty was satisfied by the seaworthiness of the first vessel, and that there was no warranty as to the vessels used in completing the voyage. His discussion of the question is quite elaborate and his conclusions seems to have been fully justified by the authorities cited by him and by his analysis of the principles involved.

We have found no other case involving this precise question, and the editors of the American & English En-

cyclopedia, volume 19, p. 1004, state that the question has not been settled nor discussed in any other cases.

The present policy does not, in our judgment, contain any clause similar to that referred to by Judge Bosworth, nor in any way indicate that separate risks are involved. The policy provides that "the said insurance shall be and is an insurance (lost or not lost) at and from Tacoma or Seattle to Dawson," and further "the said assurer agrees and promises that the insurance aforesaid commenced upon the freight and goods or merchandise from the loading of said goods on board the said ship or vessel at as above and continued until the said goods or merchandise be discharged and safely landed at as above." Although the policy on its face states that the voyage is to be performed by two vessels, the risk is treated as one risk. It is one insurance upon one entire voyage or carriage to be performed by two vessels connecting at St. Michael; one entire premium covering the whole risk. There is reason for the remark of Judge Hoffman in the Van Volkenberg case "beyond a doubt the course of modern decisions is to check and restrict the theory of an implied warranty. It appears to me that the present case is one without a precedent, and I do not see that it is fairly within any principle which has been allowed to govern any of the cases upon the subject." The rule of implied warranty of seaworthiness as applied to cargo policies is itself harsh, and it should not be extended beyond the

limits already established by the decided cases. The court below concurred in the view expressed by us, if the contention that the policy was indivisible was correct, but he thought the policy was divisible. This view was based upon the following clause in the policy: "Warranted free from particular average, unless the vessel or craft be stranded, sunk, or burnt, each craft or lighter being deemed a separate insurance." The learned court below construed this as making the insurance as to the voyage of the "Kerr" separate and distinct for the purpose of applying the implied warranty. We think that this clause applies merely to the effect of the warranty, free of particular average, and reading it with the context it means that the total loss of all of the cargo upon any particular lighter or craft would entitle the assured to a recovery, although such cargo amounted to only a small part of the entire shipment.

Ordinarily, where an implied warranty is reached the insurance never attaches, and the owner is entitled to a return of any premium paid for such insurance, for the reason that no risk has attached and therefore no premium has been earned. In this case, one single premium of $900.00 was paid for the entire risk from Tacoma to Dawson. There is nothing found in the contract between the parties by which an apportionment of this premium could be made. It is impossible for the court to determine what amount of the premium was intended to cover the risk

from Tacoma to St. Michael's, and what part to cover the risk from St. Michael's to Dawson. If by reason of the alleged unseaworthiness of the "Kerr" the risk from St. Michaels to Dawson never attached, then manifestly the assured was entitled to a return of that portion of the premium covering that part of the risk. The general rule, not only in insurance contracts but in all other contracts, is that a single consideration implies an indivisible contract. In Parson on Contract, page 51, the general rule is stated as follows: "If consideration to be paid is single and entire, the contract must be held to be entire, although the subject of the contract may consist of distinct and wholly independent items." This rule has been applied in numerous cases to fire policies. For instance, "where there is an insurance upon a storehouse and stock of goods therein for a gross premium, and containing a warranty that inventories of the goods will be taken at stated intervals. A breach of this warranty will void the entire policy both as to the house as well as the goods, although the warranty applied to the merchandise only."

I Wooden Fire Ins. p. 384, and cases there cited.

The rule as to marine policies is stated in English Ruling Cases, Vol. 14, p. 501, as follows:

"The contract is construed as indivisible where it is made for an entire premium, and no part of the voyage is expressed to be insured upon a constituency which does not apply to the rest. But where part of the voyage is insured subject to an express warranty which imports

contingency,—as where the voyage is from A to B, and thence with convoy to C,—then evidence of a usage may be admitted to show that the premium is apportionable and the contract divisible."

In the present case there was no express warranty of seaworthiness of either vessel, nor is there any evidence of any usage of the apportionment of the premium as between the voyage from Tacoma to St. Michael and from St. Michael to Dawson.

V.

It is contended by the appellant that the forwarding charges were disproportionate to the value of the goods and unreasonable under the facts in the case. Mr. Bryant testified that the contract made by him with Mr. Ford for forwarding the goods was the best contract he could obtain, and that under all of the circumstances the contract was a reasonable one. Record, page 42 E-9 In the telegram sent from Bryant, which is found on page 274 of the record, he stated that the cost of forwarding the goods from the "Lightning" would be about 13 cents a pound and from the "Kerr" about 16 cents per pound. This telegram was shown to Mr. Harrison, who represented the insurance company, on November 9, or 10th, so that he had full knowledge of what the cost of forwarding would be. He assented to the forwarding of the goods with that information. There is no testimony in the rec-

ord which remotely tends to show that the goods could have been forwarded during the winter season at a lesser rate than was paid. We submit therefore, that it was shown by the record first, that the forwarding charges were the best obtainable; second, that they were reasonable, and third, that the insurance company assented to the charges before the contract of the removal of the goods from the "Kerr" was entered into.

It is shown by the record that the contract with Ford for the forwarding of the goods from the steamer "Lightning," was entered into on October 31, which was prior to the time the insurance company agreed to the forwarding of the goods. The fact that such a contract had been entered into was not known to the owner of the goods at the time of this agreement with the insurance company. The contract for the forwarding of the goods from the steamer "Kerr,"' however, was not entered into until December, five or six weeks after the insurance company had agreed that the goods should be forwarded. While. therefore, the insurance company was not notified of the contract for the forwarding of the goods on the "Lightning" until after that contract was made. they did approve the price at which the contract was made and they authorized the contract for the forwarding of the goods from the "Kerr" before the contract was entered into with Ford for that service.

The appellant has some recital, in the contract with Ford for the forwarding of the goods from the "Lightning" and bases an argument thereon that the purpose of forwarding the goods was to reach the winter market rather than save the goods. They omit to mention the fact, however, that no such recital was contained in the contract for the removal of the goods from the "Kerr." As a matter of fact the owner was anxious to get the goods to Dawson at the earliest date practicable, if the goods were to be removed at all. They could be removed early in the season at no greater expense than would be incurred later, and the owner would receive them in time to get some benefit from the market for which he had purchased the goods. We have attempted heretofore to show that the propriety and necessity of removing the goods from the "Lightning" was not a debatable question, because that vessel not being refrigerated the failure to move the goods prior to the warm weather of the spring would inevitably have resulted in their destruction. The record also shows that the work of removing the goods from the "Lightning" commenced as early in the winter season as it was possible to use the trails, and that it was prosecuted vigorously during the entire winter. The last goods that were forwarded from the Kerr having reached Dawson in April. A small quantity of the goods on the "Kerr" were not removed at all, because the warm weather of the spring came on before the work of removal was completed. It is perfectly apparent, therefore, that inasmuch

as both parties had decided that the goods should be removed to Dawson during the winter months, it was necessary to prosecute the work of removal expeditiously and energetically. The contract made for the removal of the goods from both the "Lightning" and the "Kerr" contained proper provisions to insure this end.

VI.

The appellant further contends that it was the duty of the Pacific Cold Storage Company as a carrier, and in order to earn its freight, to forward these goods overland to Dawson and that the underwriter is not liable for that reason. We think it is not necessary to elaborately discuss this proposition. When the vessel was frozen in the ice and became impracticable for it to carry the goods into Dawson, the carrier was at liberty to abandon the voyage and notify the owner to take charge of his goods. We believe that there is no authority which holds that the duty of trans-shipment rests upon the carrier as such where the cost of such forwarding exceeds the total amount of the freight which he will earn by the entire voyage. If the ship is disabled at an inaccessible point and the master is unable to communicate with either the owner or the underwriter, it is his duty, acting for all parties concerned, to take the best care of the goods possible, and trans-ship them, if such is feasible, or forward them by land convey-

ance. if necessary, for their preservation. In doing so, however, he is not acting as carrier in order to earn his freight, but is acting as the agent of all parties concerned. As a carrier he has no interest to forward the goods where the expense would exceed the freight money. That is obviously the case here.

Besides, as we have repeatedly stated before, the carrier as such did not undertake to forward the goods, but the owner with the knowledge and direction of the underwriter, forwarded the goods. The underwriter recognized that the carrier as such was not under obligations to incur the expense involved in an overland carriage, and therefore he directed the owner to forward the goods and agreed to pay such proportion thereof as he was liable for under his policy. That the carrier is not obligated to forward goods overland in order to save his freight where the expense exceeds the total amount of his freight, it is fully established by the authorities.

VII.

The appellant has criticised the adjustment made by Mr. Alexander. We think that no defense of the adjustment is required from us. The documents and expense vouchers were all delivered to the adjuster and he adjusted the loss in the usual and ordinary way. In determining what items were chargeable to the general average it is necessary for him to examine the documents and have evidence to show the nature of the expenditures and charges for which they are made. In determining what items were chargeable under the sue and labor clause of the policy, it was necessary for him to determine whether the goods were exposed to peril or loss which was covered by the policy, and if so, whether it was reasonable for the assured to incur expense in averting that loss, and what expenses were so incurred. This the adjuster has done.

The appellant has contended that these forwarding charges should have been average expenses; the adjuster treated them as expenses incurred for the safety of the cargo alone, and being recoverable under the sue and labor clause of the policy. We think that view correct.

The goods were removed and forwarded to Dawson for their own safety alone. The vessels remained in the ice and exposed to the same perils after the removal of the goods that existed before they were removed. The rule is well settled that when cargo is separated from the ship with no intention to return it on board, the charges and expenses thereafter incurred for the safety of the cargo are particular charges against the cargo alone.

The L'Amerique, 35 Fed. 835,

Gourlie, Gen. Av. p. 398.

The record shows that Dawson was not only the destination point of these goods, but it was the only point where there was either a market for them, or where they could be placed in safety.

There is a clause in this policy which we do not find in any other policy with which we are familiar. It reads as follows:

> "It is hereby understood and agreed that in case of claim for loss or damage under this policy, the same shall be reported as soon as the goods are landed or the loss known to M. C. Harrison & Company, to whom proofs of loss must in all cases be submitted for verification, and that all claims hereunder will be paid in gold on presentation of certificate of approval of a competent adjuster to the loss at Seattle, Washington, or at San Francisco, California."

We respectfully submit to the court, that this clause binds the Insurance Company to pay whatever claim is submitted and approved by a competent adjuster at either

of the cities named. It will be observed that this clause provides that any claim for loss or damage under the policy shall be reported promptly to M. C. Harrison & Company, and that the proofs of loss must be submitted to them; and further provides that all such claims will be paid on presentation of certificate of approval of a competent adjuster. Ordinarily where the claim is presented to the Insurance Company, and the proofs submitted to them for their verification, the claim is due and payable at once. An adjustment is a matter of convenience in order to get the benefit of the experience and skill of the adjuster in determining values and apportionment. It, after this loss occurred, the Insurance Company had agreed that it was to pay the claim upon the certificate of approval of Mr. Alexander, we apprehend there would be no dispute over the question that it was bound to pay such amount as Mr. Alexander found and certified to be due on the claim. We see no reason why an agreement in advance, and which was embodied in the policy, to pay such claims thereunder as are approved and certified by a competent adjuster, is not equally binding upon the Insurance Company. Presumably that clause was inserted in the policy as an inducement. If it had been intended by the Insurance Company to express the thought that no claim should be paid under the policy until after an adjustment by a competent adjuster, we assume that the phraseology used in the policy would have covered that

thought. The language of the Company as used naturally conveys the idea that any claims made under the policy, of sufficient merit to receive the certificate of approval of a competent adjuster, will be paid by the Company upon the presentation of this certificate. If this construction of the policy is correct, the Company was bound by the results of Mr. Alexander's adjustment.

We understand that the appellant does not contest the correctness of any item of expenditure embraced in the adjustment. The vouchers showing these expenditures have been omitted from the records under a stipulation that the items themselves were not subject to contention in the case.

We most respectfully insist that the case should be affirmed.

W. H. BOGLE,
Proctor for Appellee.